

# Canada-UK Free Trade: Balancing progressive trade policies and economic benefits

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## Executive Summary

The United Kingdom (UK) and Canada face uncertainty as they respectively manage relations with their largest trading partners: both the UK's withdrawal from the European Union (EU) post-Brexit and an aggressive American pivot toward a protectionist trade agenda threaten stability and economic prosperity. Canada and the United Kingdom (UK) have prospered from a productive commercial relationship. Their two-way merchandise trade totaled more than C\$25.3 billion in 2016, making the UK Canada's fifth-largest merchandise trade partner and making Canada the UK's eighth biggest export market outside the EU. The UK is the second largest source of FDI to Canada and Canada's second most significant destination for FDI abroad. Brexit has made the future of this relationship uncertain. Crucial to the future of Canada-UK relations is the possibility of a new Canada-UK Free Trade Agreement (FTA). CETA will not apply to Canada-UK trade after the UK leaves the EU on March 29, 2019. Canadian Prime Minister Justin Trudeau and UK Prime Minister Theresa May have said that both countries are working on a Canada-UK FTA for after 2019. For Canada-UK bilateral trade negotiations to be successful, policy makers must address the reasons why the UK voted for Brexit, and why the recent US election resulted in a populist administration and protectionist agenda. We examine how Canada and the UK can deliver on a trade agenda that is progressive in nature, inclusive in impact, and supported by Canadian and British citizens-as-voters.

We examine the prospect for a progressive free trade agreement (FTA) between Canada and the UK. Canada has been very active in negotiating and signing trade agreements and we examine the provisions of these agreements (e.g. CETA, CPTPP) to highlight best practices in building support to overcome domestic opposition. Our analysis finds that the provisions regulating labour and the environment within FTAs are progressively expanding in both scope and legal enforceability. FTAs have become attractive fora to negotiate non-trade rules in exchange for market access because FTAs can link non-trade policy objectives within increasingly 'judicialized' treaties. At the limit, such regulatory commitments can be made more enforceable when they are linked to trade agreements, as trade retaliatory measures could be permitted in the event of non-compliance, either as a result of dispute settlement or by unilateral action. Whether or not labour and environmental provisions can meet their national policy objectives still remains dependent on domestic factors such as the political will and resources to enforce these laws.

Brexit will reduce income per capita in the UK. To mitigate the economic costs of leaving, the UK should remain closely integrated into the Single Market and maintain similar access to other partner countries that the UK currently enjoys through EU membership, including Canada. The UK and Canada should negotiate an FTA with strong environmental and labour provisions. It would be progressive, but unprecedented to include an independent enforcement body or explicit targets for the parties to achieve within the commitments of the trade agreement. Based on our analysis of recent Canadian FTAs, a progressive Canada-UK FTA could be signed but it is not clear that these provisions will be effective at addressing issues such as independent monitoring and enforcing labour, environmental and social rights, or achieving government's nationally determined emission reductions under the Paris Agreement.

## Introduction

Canada and the United Kingdom (UK) have prospered from a productive commercial relationship. Their two-way merchandise trade totaled more than C\$25.3 billion in 2016, making the UK Canada's fifth-largest merchandise trade partner and making Canada the UK's eighth biggest export market outside the EU. The UK is the second largest source of FDI to Canada and Canada's second most significant destination for

FDI abroad. Brexit has made the future of this relationship uncertain. Various trade and financial institutions, such as Export Development Canada (EDC), the Business Development Bank of Canada (BDC), and the Royal Bank of Canada (RBC) note that Brexit may affect Canadian exports and investments. Brexit could make the UK a less attractive destination for Canadian investment due to uncertainty over the UK's market access to the EU. Further, Brexit could result in Canadian exporters facing the same tariff structure that was in place before the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). This would raise the costs of doing business, particularly for exporters of Canadian services. For these reasons, Canadian businesses may direct more of their business to the EU.

Crucial to the future of Canada-UK relations is the possibility of a new Canada-UK Free Trade Agreement (FTA). CETA will not apply to Canada-UK trade after the UK leaves the EU in 2019. Canadian Prime Minister Justin Trudeau and UK Prime Minister Theresa May have said that both countries are working on a Canada-UK FTA for after 2019. Under a 'Global UK', negotiating a deep integration trade agreement with Canada would allow the UK a stepping stone into lucrative markets in Asia Pacific and Latin America. One trade option therefore is to maintain the bilateral market access between Canada and the UK gained with the implementation of CETA. This gives rise to the need to design a trade agreement that supports both business and social interests. Some believe that the UK and EU will end up with a CETA-like trade deal. Is the "progressive" nature of CETA a good fit for a Canada-UK trade deal as well, or are there more appropriate approaches to take greater account of public concerns about the social and environmental effects of trade agreements?

Policymakers need to determine what a Canada-UK FTA should look like and how to pursue it. This may be the ideal opportunity for Canada and the UK to build on their common values and shared institutions to establish their policy positions in a post-Brexit context. This would provide an early harvest of trade commitments and inform future negotiations with other trading partners. Although there has been push-back from countries like China towards Canada's progressive trade policy agenda, a trade partner like the UK offers more promise. This paper assesses whether Canada-UK trade relations can engage diverse stakeholders to develop a trade agreement that is both comprehensive and progressive in nature.

One issue for analysis is understanding why there is a growing reaction against deeper economic integration. It is also useful to understand why FTAs fail to live up to societal expectations. Who are the losers from free trade and who opposes free trade and globalization? Who are the supporters of Brexit and the US Trump administration? Various civil society groups are increasingly questioning trade policy despite its potential to bring tangible economic benefits to firms and consumers alike. While the long-term macroeconomic benefits from international trade are well-documented, the empirical evidence for individual consumer gains is less understood and communicated. Policymakers must understand and address the challenges created by FTAs and create an economic environment that will benefit more people if a Canada-UK FTA is to be successful in the long-run and provide a model for the UK trade agenda.

Anti-globalization sentiment triggered in part by rising income inequality helped create the preconditions for Brexit and the election of a populist and protectionist American president. Canada has mostly avoided this. However, the Canadian economy is not immune from the rise of income inequality and, therefore, anti-globalization movements. Brexit should be a "wake-up" call for Canadian policymakers to address increased social inequality and avoid isolationist movements that threaten the economic and social benefits of an open economy.

Understanding these dynamics will allow for proactive steps to be taken to prevent a future breakdown of a Canada-UK trade agreement. A comprehensive survey of the provisions and negotiating history of other free trade agreements including NAFTA, CETA, Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) will help to identify the demands and limits of both business and civil society. For a Canada-UK FTA to be successful in the long-run and provide a clear model for the future UK trade agenda, policymakers must address the challenges created by FTAs and build an economic environment that are perceived to be more widely beneficial.

This paper examines whether and how a Canada-UK trade agreement can bring an 'early harvest' success story to the UK trade agenda post-Brexit and for Canada to push its progressive trade agenda in this new era of aggressive unilateralism in the US. Several of Canada's most recent multilateral trade agreements support deep integration; however, Canada has been pushing this "progressive trade" agenda with mixed results. Yet, with shared values and similar institutions, the UK provides an ideal opportunity for Canada to bring its progressive trade agenda forward with a favourable partner. The UK was an important market of the recent Canada-EU CETA agreement and with Brexit that market is now missing from that agreement. On the other hand, Canada also provides an ideal partner for the UK to develop its

nascent trade agenda and build its trade negotiating capacity in a post-Brexit world. The commercial relationship between these two countries is supported by shared values, cultures, and a positive colonial relationship. Following the strategy of 'Global Britain,' the UK could find that closer economic ties with Canada serves as a useful springboard into lucrative Asia Pacific and Latin American markets.

Our paper focuses on how Canada and the UK can take advantage of this unique opportunity to design a trade agreement that is comprehensive and progressive in nature and provides the architecture for a new, next generation of trade agreements. The challenge Canada and the UK face are of balancing progressive trade policies that deliver economic benefits with a trade agreement that is seen to benefit society more widely and does not threaten sovereignty. Canadians and Britons must ask if Canada's progressive trade agenda is a good model for a Canada-UK FTA. Inclusion efforts may impact free trade but can help to develop a more successful, publicly supported bilateral agreement. In sum, this research identifies whether Canada-UK trade relations present a timely opportunity for the UK to develop a free and fair trade external trade policy post Brexit, while Canada builds its distinct strategy of inclusive international trade in the face of the renegotiation of NAFTA and increased US protectionism.

## **Labour and environmental regimes in regional trading arrangements: Lessons for a Canada-UK fair and progressive FTA**

The demand for the regulation of behind-the-border issues, such as labour and environmental standards, is an increasingly common feature of international trade negotiations. Now that many countries have successfully negotiated the inclusion of such provisions within regional trade agreements (RTAs), questions are emerging on the relative merits of the different approaches taken by the parties. This paper assesses how international labour and environmental law within RTAs has developed and identifies areas of relevance for a future Canada – UK fair and progressive trade agreement.<sup>1</sup> The paper employs a multi-dimensional method of legal analysis to clarify the relative nature of these trading regimes. The results are used to determine whether there has been a significant shift in the way labour and environmental standards are being incorporated into RTAs in response to social demands, or 'collective preferences.'<sup>2</sup>

The paper shows that the provisions regulating labour and the environment within RTAs are progressively expanding in both scope and legal enforceability. One of the reasons RTAs have become an attractive fora from which to negotiate non-trade law in exchange for market access concessions is because these agreements can link non-trade policy objectives within increasingly 'judicialized' treaties.<sup>3</sup> At the limit such regulatory commitments can be made more enforceable when they are linked to trade agreements because trade retaliatory measures could potentially be permitted in the event of non-compliance either as a result of dispute settlement or by unilateral action.

This paper contends while these regional developments could be considered 'WTO Plus' to the extent that the WTO does not seek to regulate either labour or the environment, an overview of the rules suggests that even under the most recently negotiated North American Free Trade Agreement (NAFTA) agreement (the so-called USMCA), there are still clear limits to how far these RTA provisions encroach on the domestic regulatory sovereignty of any of the parties to an agreement. That is, were the UK and Canada to negotiate an FTA with environmental and labour provisions, they would be unprecedented if they were, for example, to include an independent enforcement body or explicit targets for the parties to achieve within the commitments of the trade agreement.

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1 The agreements chosen were: Australia-Singapore; Australia-Thailand; Chile-Efta ; Efta-Mexico; Efta-Singapore; Efta-Korea; Singapore-Korea; Singapore-India; Canada-Chile; Canada-Costa Rica; Chile-EU; Japan-Singapore; Japan-Mexico; Japan-Malaysia, Japan-Philippines, The NAFTA; US-Jordan; US-Singapore; US-Chile; US-Morocco; US-CAFTA-DR; US-Australia; US-Bahrain; US-Oman; US-Peru and US-Korea.

2 In 2004 Pascal Lamy defined collective preferences as 'the end result of choices made by human communities that apply to the community as a whole.' The speech also acknowledged that both the 'collective' or community and collective preferences were difficult to define, not always rational, open to dispute but ultimately to be seen as values. P. Lamy. 'The emergence of collective preferences in international trade: implications for regulating globalization.' Conference on "Collective preferences and global governance: what future for the multilateral trading system", Brussels, 15 September 2004.

3 'Judicialization' is seen as the increasing reliance on judicial or quasi-judicial solutions to international disputes and the strengthened enforcement of binding sets of objectives. The term 'judicial' and its derivations have the advantage of distinguishing between legislative and judicial functions of international institutions. De Bièvre, Dirk (2006) 'The EU regulatory trade agenda and the quest for WTO enforcement', *Journal of European Public Policy*, 13:6, 851 – 866.

# The Rise of Environmental Provisions in FTAs

## The agreements' preambles and objectives

This section identifies whether or not the subject matter under analysis is explicitly related to the overall trade obligations of the regional members. The preamble to an RTA does not contain any binding obligations upon the Parties; the statements are not intended to be *operative* provisions in the sense of creating specific rights or obligations. Rather, the statements offer a context for the signatories' overall objectives by introducing the agreement, setting out the motives of the contracting Parties and the objectives to be accomplished by the provisions of the statutes.

Nevertheless, a preamble is designed to establish a definitive record of the intention or purpose of the Parties in entering into the agreement, and this can inform or 'colour' the interpretation of a treaty provision. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that the preamble forms part of the treaty text and, as such, part of the terms and 'context' of the treaty for purposes of interpretation.<sup>4</sup> The Appellate Body of the WTO has also emphasized on several occasions that Article 31 VCLT is a fundamental reference point for WTO dispute settlement. There is therefore a basis in customary international law for the preamble to any treaty, including an RTA, to be used as a source of interpretative guidance in the process of implementation and dispute settlement.

## Pre-2010 FTAs

Given that an agreement's preamble objectives indicate how the subject is - or is not - related to the trade obligations of the regional members, it is significant that many of the early RTAs did not express themselves on the Parties' environmental objectives in the preamble.<sup>5</sup> However, this was not the same set of RTAs or signatory countries as those that did not include labour statements in their RTA preamble. The EFTA and the India-Singapore RTAs, for example, include environmental but not labour statements in the preamble to their agreements. All of the US RTAs contain at least one reference to protecting and enhancing the environment in the preamble. The most used model<sup>6</sup> identified here sets out social development goals together in a single statement. The EU-Chile preamble expresses the need 'to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements.' Similarly, the US-Australia RTA simply states that the Parties will implement the agreement in a manner 'consistent with their commitment to high labour standards, sustainable development, and environmental protection.' The benchmark for 'high standards' is not set out however.

The preamble to the EFTA, US-Peru, India-Singapore, and US-CAFTA-DR RTAs follow a model that includes one or two statements exclusively on the environment. These statements indicate the Parties' commitment to implement the agreement in a manner consistent with environmental protection and conservation, and to promoting sustainable development. The US-Singapore and US-Chile preambles go the furthest, by including an additional reference to promoting regional environmental cooperative activities and existing commitments to multilateral environmental agreements. Boilerplate language is identified in those RTAs with a separate environmental side agreement.<sup>7</sup> These contain a specific commitment to the *Stockholm Declaration on the Human Environment* of 1972 and the *Rio Declaration on Environment and Development* of 1992 in the preamble to the side agreement. The preambles to the main NAFTA provisions and to the Canada-Chile agreement also contain environmental statements that are similar to those set out in the US-Chile RTA.

## Post-2010 RTAs

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4 Article 31 of the VCLT provides in relevant part: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.

Article 32 of the VCLT provides: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

5 This list includes: Australia – Thailand, Australia – Singapore, all the RTAs with Japan (Mexico, Malaysia, Singapore and Philippines), and the Singapore – NZ and Singapore – Korea RTAs.

6 The US-Jordan, US-Morocco, US-Bahrain and US-Korea RTAs.

7 The NAFTA/NAAEC, Canada-Chile, Canada-Costa Rica.

Of the four most recent RTAs surveyed here,<sup>8</sup> all of them include at least one expression on the environment in their preambles. The most minimal is the CPTPP preamble, which includes just one recital to reaffirm the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest. The USMCA preamble on the other hand includes three expressions. The first recognizes the parties' inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, in a manner consistent with this Agreement, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals, in accordance with the rights and obligations provided in this Agreement. Second, the parties agree to protect human, animal, or plant life or health in the territories of the Parties and advance science-based decision making while facilitating trade between them. Third, to promote high levels of environmental protection, including through effective enforcement by each Party of its environmental laws, as well as through enhanced environmental cooperation, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices.

Both the EU Singapore and the CETA agreements include two similar expressions. Both preambles state that the parties are determined/committed to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions, and to promote trade and investment in a manner mindful of high levels of environmental and labour protection and relevant internationally-recognised standards and agreements to which they are Parties. They also reaffirm each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity.

### **The scope of obligations for the subject area**

The scope of an international treaty can be primarily delimited in terms of its geographical coverage. This is determined by the territorial jurisdiction of the signatories. Its scope can also be viewed temporally, in terms of the date the treaty entered into force and its expected duration. The focus of this paper is on the scope of the subject matter within the provisions of the treaty. This includes the types of rights covered by the agreement and whether these rights will be based on national or international standards. An assessment of these provisions can identify how wide or narrow the scope of agreement's obligations is, along with the standards the provisions are seeking to apply.

The key variables identified here include first, whether or not the agreement references or incorporates other bodies of international law. The EC-Chile RTA expresses commitment to relevant ILO conventions,<sup>9</sup> for example. Second, whether the agreement reaffirms the supremacy of national laws or alternatively establishes an independent regional law. And third, in the case of allegations of non-compliance between the parties to the agreement, whether the RTA provisions set out a 'trade affecting' requirement that requires the party alleging non-compliance to identify a 'link' between the non-enforced law and its impact on trade between the parties. Such a requirement sets a higher threshold for a non-compliant measure to be violation of the agreement.

### **The Early FTAs**

The range of environmental obligations identified in the earlier RTAs surveyed ranged from those agreements without any provisions, to those with a commitment to implement Multilateral Environmental Agreements (MEAs) within a chapter or side agreement dedicated to regulating the environment. In between these extremes are provisions limited to detailing environmental cooperation activities and those linking environmental standards to investment activities between the parties to the agreement.

Thus, at one extreme, and despite including preamble statements on the environment, are the earlier FTA agreements that do not contain any environmental provisions.<sup>10</sup> The scope of the environmental provisions in Japan–Mexico and Japan–Malaysia RTAs goes slightly further to set out environmental

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<sup>8</sup> USMCA, CPTPP, CETA, EU-Singapore.

<sup>9</sup> EC-Chile RTA. Article 44:1.

<sup>10</sup> The Japan–Philippines, Article 5.11. Similarly, the India–Singapore RTA includes a statement in the preamble on environmental protection, yet the only relevant provision regulating the environment is set out within the chapter on Standards and Technical Regulations, Sanitary and Phytosanitary Measures.

cooperation activities, including information exchange and capacity building related to the Clean Development Mechanism of the Kyoto Protocol.<sup>11</sup> Nevertheless, the provisions make no other reference to either the Parties' domestic environmental standards or law enforcement, or to any commitments to multilateral environmental agreements. The minimal model set out in the Japan–Philippine RTA does not contain any statements relating to the environment in their preamble, but Article 102 states that the Parties should not encourage investments by investors of the other Party by relaxing its environmental measures. This is similar to the labour provision preventing 'race to the bottom' standards and policy within this RTA and it is also subject to the general Dispute Settlement Mechanism (DSM) of the agreement. Although it links environmental standards only in the area of investment, it has legal strength from being covered by the general trade agreements' DSM.

The model<sup>12</sup> most favoured by the US is characterised by a separate environment chapter with boilerplate provisions recognizing the right for each Party to the agreement to set their own domestic laws and standards of environmental protection. The Parties make a commitment that 'high standards' of protection are to be continually improved upon. However, the 'high standard' is not made with reference to an independent benchmark. The Parties instead make a commitment not to fail to enforce each their domestic environmental laws effectively and agree that all enforcement activities relating to the environment must be confined to a Party's own country.<sup>13</sup> This model of agreement explicitly recognizes the role of multilateral environmental agreements but they do not reference any of them by name within the provisions of the agreement. The RTAs with the environmental side agreements<sup>14</sup> similarly include provisions with an express right for each Party to set their own 'high' level of domestic protection and nationally defined policies and priorities for the environment. Each Party 'shall' then enforce these laws effectively domestically.

Those RTAs with side-agreements have chosen to include provisions which maintain existing rights and obligations under other MEAs, including conservation agreements:

*Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party.*<sup>15</sup>

Thus, the NAFTA affirms the rights of the Parties under certain international and bilateral environmental agreements, including the right to use discriminatory trade measures. These rights prevail over obligations in the NAFTA in the event of an inconsistency. That is, market access rights granted under the NAFTA could potentially be undermined by rights to restrict trade according to a Multilateral Environmental Agreement (MEA), where the NAFTA members are Parties to the MEA. This contrasts with the GATT and other agreements, which are superseded by the NAFTA obligations as long as they are in conformity with Article XXIV GATT. The investment section of the NAFTA contains provisions using terminology that is vague, such as 'environmentally sensitive' and the Parties are 'encouraged' not to relax environmental measures to promote investment. The NAFTA also allowed for general exceptions for some environmental reasons as they appear in the GATT, except for the explicit incorporation of both living and non-living exhaustible natural resources.

## Post-2010 RTAs

The more recent agreements surveyed have moved away from including a side agreement on the environment. The EU-Singapore, EU-Canada CETA, the USMCA and the CPTPP RTAs all have a chapter dedicated to the environment or sustainable development and these chapters are addressing a wider scope of issues within the chapter, such as sustainable fishing and timber trade. Nevertheless, what has not changed

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11 The Clean Development Mechanism (CDM) is one of the "flexibility" mechanisms defined in Article 12 of the Kyoto Protocol (IPCC, 2007). It is intended to assist the United Nations Framework Convention on Climate Change (UNFCCC), and compliance with quantified emission limitation and reduction commitments (greenhouse gas (GHG) emission caps).

12 This includes the US-Singapore, US-CAFTA-DR, US-Chile, US-Oman, US-Morocco, US-Bahrain, US-Australia, US-Korea RTAs.

13 These agreements all define environmental law to mean any domestic statute, regulation or provision primarily designed to protect the environment, or prevent a danger to human, animal, or plant life or health, through: the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants; the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.

14 The NAFTA/NAAEC, Canada-Chile and Canada-Costa Rica RTAs.

15 The NAAEC. Article 40.

is the focus on implementing domestic regulation and, as with the traditional EU FTAs, the emphasis of the CETA and EU-Singapore agreements remains focused on cooperation and dialogue rather than a sanction-based dispute settlement. While its provisions on trade and sustainable development create enforceable obligations that have the same legal value as any other obligation in the agreement. The agreement's provisions on trade and sustainable development are subject to a dedicated dispute settlement mechanism. This mechanism has a transparent, mandatory, participatory and time-bound procedure for resolving trade-related sustainable development issues. However, these do not have the same level of sanctions as the trade provisions. Under the KAFTA, for example, disputes related to environment provisions are explicitly excluded from the main dispute settlement mechanism covering the agreement, focusing on consultation and dialogue in implementing the agreement in each of the parties' sovereign jurisdiction

The scope of the New-NAFTA, the USMCA, has expanded considerably to address issues such as Protection of the Ozone Layer Protection of the Marine Environment from Ship Pollution Air Quality Marine Litter Trade and Biodiversity Invasive Alien Species Marine Wild Capture Fisheries Sustainable Fisheries Management Conservation of Marine Species Fisheries Subsidies Illegal, Unreported, and Unregulated (IUU) Fishing Conservation and Trade Sustainable Forest Management and Trade Environmental Goods and Services Indigenous peoples and local communities. However once again, the enforcement of environmental laws is still based at a domestic level. For the Parties recognize the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly. Although each Party shall strive to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and shall strive to continue to improve its respective levels of environmental protection. The USMCA environment chapter also references MEAs,<sup>16</sup> affirming each member's commitment to implement the multilateral environmental agreements to which it is a party. The Parties also commit to consult and cooperate as appropriate with respect to environmental issues of mutual interest, in particular trade-related issues, pertaining to relevant MEAs. Such as, exchanging information on the implementation of MEAs to which a Party is party; ongoing negotiations of new multilateral environmental agreements; and, each Party's respective views on becoming a party to additional multilateral environmental agreements.

The scope of issues covered in the CPTPP cover those in the USMCA, with an additional provision covering Transition to a Low Emissions and Resilient Economy.<sup>17</sup> As with the USMCA, while the provisions recognise the importance of mutually supportive trade and environmental policies and practices to improve environmental protection in the furtherance of sustainable development. The Parties maintain domestic enforcement of environmental law. They recognise the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly. However, as with the USMCA, the commitments explicitly do not empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party. Although no Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party. Each Party has the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.<sup>18</sup> The CPTPP also recognizes the importance of the multilateral environmental agreements to which they are party, and affirms commitment to implement the MEAs to which each is a party.<sup>19</sup> The Parties emphasize the need to enhance the mutual supportiveness between trade and environmental law and policies, through

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<sup>16</sup> Article 24.8: Multilateral Environmental Agreements.

<sup>17</sup> Article 20.15:

<sup>18</sup> CPTPP Article 20.3

<sup>19</sup> CPTPP Article 20.4: Multilateral Environmental Agreements

dialogue between the Parties on trade and environmental issues of mutual interest, particularly with respect to the negotiation and implementation of relevant MEAs and trade agreements.

Under the EU-Singapore and CETA agreements, the level of protection is also still based at the national level, the focus is on cooperation and consultation, and less issues are covered – only Trade in Timber and Timber Products and Trade in Fish Products, in the former,<sup>20</sup> while the EU CETA environmental provisions are expanded by trade favouring environmental protection, Trade in forest products and trade in fisheries and aquaculture products.<sup>21</sup>

### **Institutions and agencies**

This section of the assessment identifies and compares the different institutional settings provided by these agreements to deal with the implementation of the relevant obligations. This includes the creation of agencies, special committees or commissions with the aim of monitoring or developing the issues which emerge from the area under regulation. Alternatively, it could create a single contact point within a government ministry to coordinate any work associated with the obligations of the agreement.

Of additional interest are questions concerning whether there is merely a textual reference in the agreement to the role of this body or contact point, without further action specified. In some cases, the agreement may conversely set out mandatory meeting schedules, resource allocations and objectives.

### **Early RTAs**

Of the earlier RTAs surveyed, the most commonly used institutional arrangement for dealing with environmental issues is a Joint Committee established under the general administrative provisions of the agreement.<sup>22</sup> While this Joint Committee should be composed of government officials from each Party while there is no specific requirement for any environmental experts. Other US RTAs create a separate agency in the form of the Environmental Affairs Council which is composed of cabinet level or equivalent representatives of the Parties.<sup>23</sup> The agreement commits the Council to meet at least once a year to discuss the implementation and progress of the environmental provisions included in the agreement.

Despite having a side agreement on environmental regulation, the Canada-Costa Rica RTA only requires<sup>24</sup> that each Party designate a point of contact for communications between the Parties and from the public related to the implementation and elaboration of the agreement. In contrast with this, the side agreements included in the NAFTA -the North American Agreement on Environmental Cooperation (the NAAEC) and the Canada-Chile Agreement on Environmental Cooperation (CCAEC), establish a much more elaborate supranational institutional in the form of the Commission for Environmental Cooperation. The Commission is made up of a Council, a Secretariat and a Joint Public Advisory Committee. The Secretariat must consider any submission from any non-governmental organization or person asserting a Party to the agreement is failing to enforce its environmental law effectively, subject to conditions.<sup>25</sup> These provisions also commit the Parties to create National Advisory Committees (NACs), which comprise of the public and NGOs to offer input on the implementation and further elaboration of this Agreement. The Parties may also convene a governmental committee to advise further on the implementation and further elaboration of the side-agreement.

### **Post-2010 RTAs**

The institutional arrangements under the post-2010 RTAs have been consolidated in the later models. Under the USMCA agreement, the requirement is for the establishment of an Environment Committee and Contact Points.<sup>26</sup> The Environment Committee must be composed of senior government representatives, or their designees, of the relevant trade and environment national authorities of each Party responsible for

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20 Article 12.7 Trade in Timber and Timber Products

Article 12.8 Trade in Fish Products

21 Article 24.9 Trade favouring environmental protection

Article 24.10 Trade in forest products

Article 24.11 Trade in fisheries and aquaculture product

22 The US–Singapore, US–Oman US–Jordan, US–Morocco, US–Bahrain, US–Australia RTAs.

23 The US–CAFTA–DR, US–Chile, and the US–Korea RTAs.

24 The Canada–Costa Rica RTA. Article 10.

25 If it is, *inter alia*: is in a designated language, provides sufficient information to allow the Secretariat to review the submission, ‘appears to be aimed at promoting enforcement rather than at harassing industry’ and is filed by a person or organization residing or established in the territory of a Party.

26 Article 24.26: Environment Committee and Contact Points



the implementation of this Chapter. The Environment Committee is to oversee the implementation of this Chapter and its functions include discussion, information exchange, senior consultations on enforcement matters. After meeting within one year of the date of entry into force of this Agreement, the Environment Committee shall meet every two years unless the Environment Committee agrees otherwise. During the fifth year, the Environment Committee shall review the implementation and operation of this Chapter; report its findings and recommendations to the Council and the Commission.

Under CETA, the institutional mechanisms consist of a designated office to serve as contact point with the other Party for the implementation of the Chapter, including with regard to cooperative programmes and activities, the receipt of submissions, communications and information to be provided to the other Party, the Panel of Experts, and the public.<sup>27</sup> In addition, the Committee on Trade and Sustainable Development established under the trade and sustainable development chapter shall oversee the implementation of the environment Chapter and review the progress achieved under it and discuss any matters of common interest.<sup>28</sup> The Committee on Trade and Sustainable Development, shall be comprised of high level representatives of the Parties responsible for environmental matters.<sup>29</sup> The Committee on Trade and Sustainable Development must meet within the first year of the entry into force of this Agreement, and thereafter as often as the Parties consider necessary. A dialogue is also established with a Civil Society Forum composed of representatives of civil society organisations should also be convened once a year unless otherwise agreed.<sup>30</sup>

The arrangement is similar under the EU Singapore FTA. Each Party designates a contact point with the other Party and establish a Board on Trade and Sustainable Development comprised of senior officials from within the administrations of each Party. The Board shall meet within the first two years and thereafter as necessary, to oversee the implementation of this Chapter.<sup>31</sup> Each meeting of the Board shall include a public session with stakeholders to exchange views on issues related to the implementation of this Chapter.

Under the CPTPP, a contact point and an Environment Committee composed of senior government representatives is also established to discuss and review the implementation of this Chapter. The Committee shall meet within the first year and thereafter every two years unless otherwise agreed.<sup>32</sup> The Committee shall provide for public input on matters relevant to the Committee's work, as appropriate, and shall hold a public session at each meeting.

### **Monitoring, enforcement and dispute settlement mechanisms**

This section assesses how *strong* or binding the obligations are in terms of ensuring the parties fulfil the negotiated obligations. This can be shown by identifying the RTA provisions regulating how disputes are settled in the event of non-compliance. Relevant questions include whether disputes relating to the commitments covering labour standards or the environment fall under the same dispute settlement provisions that cover the commitments regulating the trade in goods, or whether they have separate DSM provisions of their own, which may not be as strong as those covering the trade provisions.

The characteristics of the DSM are also assessed for whether or not they extend beyond 'good offices' and 'conciliation' to include an independent report and recommendations or directives for remedial action. The possible final remedies are identified to see whether actions or enforcement activities must be limited to the domestic legal order. Further, whether private parties, producers or consumers can be made the beneficiary of a remedy, or whether they are limited only to the states involved in the dispute. In the event that a Party fails to remedy its violation of its obligations there may be a right of countervailing action in the agreement, in addition to the ultimate action of withdrawing from the overall agreement. Lastly, the agreements are scanned for conflict clauses or articles setting out the hierarchy of international agreements in the event of conflict of obligations. These indicate the ultimate priority accorded to the obligations of the various international agreements entered into by the parties to an RTA.

### **The Early RTAs**

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<sup>27</sup> CETA Article 24.13 Institutional Arrangements

<sup>28</sup> CETA Article 26.2.1(g) (Specialised committees)

<sup>29</sup> CETA Article 22.4 Institutional mechanisms

<sup>30</sup> CETA Article 22.5 Civil Society Forum

<sup>31</sup> EU Singapore Article 12.15 Institutional Set up and Monitoring Mechanism

<sup>32</sup> Article 20.19: Environment Committee and Contact Points

Among the earlier RTAs, the strongest DSM identified was in the US-Jordan RTA. Environmental disputes are subject to the core dispute settlement provisions and procedural requirements of the RTA. However, the Parties to the agreement have recourse to dispute settlement only if the other Party fails to enforce its domestic environmental laws effectively - and in a manner affecting trade between the Parties, which introduces the high violation threshold. The more elaborate but weaker DSM used by the US states that any 'interested person' can request investigations into alleged violations of domestic environmental law.<sup>33</sup> These agreements also commit the Parties to ensuring that judicial, quasi-judicial, or administrative proceedings are available, alongside effective remedies or sanctions for violations of its environmental laws. These remedies may include compliance agreements, penalties, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution. In a further act of deference to sovereign policy space, the US-CAFTA-DR RTA contains a provision explicitly exempting one Party the right to review another Party's domestic enforcement mechanisms:

*'nothing in this Chapter shall be construed to call for the examination under this Agreement of whether a Party's judicial, quasi-judicial, or administrative tribunals have appropriately applied that Party's environmental laws.'*<sup>34</sup>

The DSM within the 'environmental side agreement' model<sup>35</sup> states that if after consultation and other alternative dispute resolution mechanisms have failed, a panel must determine where there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law.<sup>36</sup> The disputing Parties may then agree to a mutually satisfactory action plan. The NAAEC's DSM also allows access to private citizens as 'interested Parties' to make submissions to the CEC Secretariat to document alleged non-enforcement of environmental laws by one or more of the NAFTA Parties. However, once again, the definition of interested Parties' is not set out, and is unclear therefore on whether an international environmental NGO would be included in this definition. This may depend on whether such an NGO had standing within the domestic legal system of each Party. Indeed, nothing entitles a Party to undertake environmental law enforcement activities in the territory of another Party. Further, no Party can provide for a right of action under its law against any other Party on the grounds that another Party has acted in a manner inconsistent with the agreement. Further there is a requirement for a request for a panel to be approved by a two-thirds vote of the Parties. This implies an ultimate reliance on diplomatic means for ensuring the majority vote needed to form a panel.

Article 104 of the NAFTA states that in the event of an inconsistency between the NAFTA and the trade provisions of multilateral environmental treaties, the latter shall 'prevail to the extent of the inconsistency.' However, it has been argued that the actual significance of this provision is unclear. Currently, there are no formal dispute settlement mechanisms available under multilateral environmental treaties should a member complain about trade sanctions taken against it because of the alleged lack of compliance with environmental obligations. The only potential legal recourse for countries is the dispute settlement mechanism available under GATT. However, it is not clear whether Article 104 applies to the Parties GATT obligations and whether Article 103 includes the GATT in its definition of 'other agreements.'<sup>37</sup>

The conflict clause included in the US-Korea RTA is also unclear:

*In the event of any inconsistency between a Party's obligations under this Agreement and a covered agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations*

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<sup>33</sup> These are set out in the US-Singapore, US-Oman, US-Morocco, US-Chile, US-Bahrain, UK-Korea RTAs.

<sup>34</sup> This RTA also has a unique provision which states that a person or organization residing or established in the US must file a submission under the NAAEC agreement (NAFTA) asserting that the US is failing to enforce its environmental laws effectively and may not file a submission under the US-CAFTA-DR provisions. This is presumably designed to coordinate and streamline the administrative application of US environmental RTA obligations in the north and central Americas.

<sup>35</sup> The NAAEC, Canada-Chile and Canada-Costa Rica RTAs.

<sup>36</sup> See The NAAEC. Article 33.

<sup>37</sup> Howse and Trebilcock. Op cit. p549.

*under the covered agreement<sup>38</sup>, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.<sup>39</sup>*

## Post 2010 RTAs

Under the USMCA dispute settlement mechanism,<sup>40</sup> if the consulting Parties fail to resolve their dispute through environment consultations, Senior Representative Consultations and Ministerial Consultations within 60 days, the requesting Party may request consultations under Dispute Settlement Consultations or request the establishment of a panel under the Dispute Settlement chapter.<sup>41</sup> This panel can seek technical advice or assistance, if appropriate, from an entity authorized under CITES to address the particular matter, and provide the consulting Parties with an opportunity to comment on any such technical advice or assistance received. This is similar to the CPTPP dispute resolution mechanism for the environment provisions<sup>42</sup> which states that ultimately, a dispute over the implementation of an environmental provision may be referred to the relevant Ministers of the consulting Parties who shall seek to resolve the matter.<sup>43</sup>

Under the CETA dispute settlement mechanism,<sup>44</sup> any dispute that arises under the trade and environment Chapter, the Parties shall only have recourse to the rules and procedures provided for in the Chapter, not the dispute resolution chapter covering the trade commitments. Rather the Parties are to rely on good offices, conciliation, or mediation to resolve that dispute. The EU-Singapore dispute settlement provisions also rely on government consultations with Panels of Experts. Indeed, the RTAs's Dispute Settlement chapter and mediation mechanism do not apply to the environment provisions.<sup>45</sup>

## Assessing environmental law in RTAs

The pioneering environmental provisions in the NAFTA's 1994 NAAEC were replicated in the Canada-Chile (CCAEC) RTA, and set the tone for future agreements including the most recent USMCA, CPTPP, CETA and EU-Singapore agreements. The most significant limitation to ensuring high environmental standards is that there is no regional harmonisation of environmental law. Again, in none of the agreements surveyed can a Party impose its level of environmental protection on another Party; all Parties are obligated to ensure the effective enforcement of the standards it has determined domestically. There are discernible differences, such as the CCAEC containing a more cooperative mechanism than the NAAEC, which instead incorporates a more punitive response to non-compliance based on the unilateral suspension of NAAEC benefits. This better reflects the development needs of the Parties to the former agreement, which explicitly excludes the use of trade sanctions and its penalty relies on a monetary fine imposed by a panel. Using more a carrot than stick approach, Canada provides Chile with cooperation programmes and capacity building measures designed to increase environmental enforcement mechanisms and assess the environmental impact of trade agreements. This might also induce a convergence with Canada's standards, although it is not an explicit objective of the agreement.

In the latest FTAs, with the exception of the KAFTA, there has been an expansion of environmental law included in the EU-Singapore, EU-Canada and the CPTPP. All FTAs have a chapter dedicated to the environment or sustainable development and these chapters are addressing a wider scope of issues within the chapter, such as sustainable fishing and timber trade. Nevertheless, what has not changed is the focus on implementing domestic regulation and, as with the traditional EU FTAs, the emphasis of the CETA and EU-Singapore agreements remains focused on cooperation and dialogue rather than a sanction-based dispute settlement. While its provisions on trade and sustainable development create enforceable obligations that have the same legal value as any other obligation in the agreement. The agreement's provisions on trade and sustainable development are subject to a dedicated dispute settlement mechanism. This mechanism has a transparent, mandatory, participatory and time-bound procedure for resolving trade-related sustainable

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38 "Covered Agreements" are those listed in Appendix 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes negotiated during the Uruguay Round. They include the Agreement Establishing the World Trade Organization; the Multilateral Trade Agreements, including the GATT, GATS and TRIPS; and subject to conditions, four plurilateral agreements.

39 US-Korea RTA. Article 21.10:3.

40 USMCA Article 24.32: Dispute Resolution

41 USMCA Article 31.7 (Dispute Settlement – Establishment of a Panel).

42 CPTPP Article 20.23: Dispute Resolution

43 CPTPP Article 20.22: Ministerial Consultations

44 CETA Article 24.16 Dispute resolution

45 EU-Singapore. Article 12.16 Government Consultations

development issues. However, these do not have the same level of sanctions as the trade provisions. Under the KAFTA, disputes related to environment provisions are explicitly excluded from the main dispute settlement mechanism covering the agreement, focusing on consultation and dialogue in implementing the agreement in each of the parties' sovereign jurisdiction.

Whether through the initial influence of the US negotiators, the CPTPP and the USMCA possess a strong dispute resolution mechanism that is applicable to its environmental provisions.<sup>46</sup> For if the consulting Parties have failed to resolve the matter under the provisions for Environment Consultations, Senior Representative Consultations or Ministerial Consultations within 60 day after the request, the requesting Party may request consultations under the dispute settlement chapter applicable to the other obligations, or request the establishment of a panel. This panel shall seek technical advice or assistance, if appropriate, from an entity authorised under CITES to address the particular matter and provide the consulting Parties with an opportunity to comment on any such technical advice or assistance received. If in its final report the panel determines that the measure at issue is inconsistent with a Party's obligations or a Party has otherwise failed to carry out its obligations in this Agreement; or the measure at issue is causing nullification or impairment the responding Party shall eliminate the non-conformity or the nullification or impairment. A complaining party may also claim compensation if the issues has not been resolved in a reasonable time period.

While all the RTAs surveyed sought to ensure that all obligations remain on enforcing domestic environmental standards, some of the agreements also contain clauses setting out the hierarchy of the RTA in relation to other international agreements signed by the parties.<sup>47</sup> This clearly serves to promote and reinforce high environmental obligations, while the conflict clause in the EFTA RTAs, on the other hand, subordinates the RTA to the rights and obligations of the WTO as well as any other international agreement the Parties may be a signatory to.<sup>48</sup> The Australia-Thailand RTA affirms not only the Parties existing rights and obligations under the GATT Technical Barriers to Trade (TBT) Agreement but also 'all other international agreements, including environmental and conservation agreements, to which the Parties are Party.'<sup>49</sup> This arguably removes the need for any environment provisions in the trade agreement. If the parties are already enforcing international environmental agreements, this would, in any event, take precedence over the RTA obligations in the event of conflict.

## The Rise of Labour Provisions in FTAs

### The preamble

#### Earlier RTAs

Of the earlier RTA preamble statements surveyed, the models identified range from those agreements without any statements on labour in the preamble, to those with a preamble dedicated to labour issues in a side agreement dedicated to labour regulation, sitting apart from the main trade agreement. Within this range, a salient feature is that all trade agreements signed with the US contain at least one reference to labour standards in the preamble. However, *except* when negotiating agreements with the US, the RTAs *between* Australia, NZ, Singapore, Japan, Malaysia, Mexico, Korea, Philippines and EFTA do not have any statements on labour in the preamble.

The most general preamble statements are those which group labour, environmental and social development issues together within one objective.<sup>50</sup> The US RTA model preamble tends to include one or

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<sup>46</sup> CPTPP Article 20.23: Dispute Resolution

<sup>47</sup> This is 'provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement. Article 104 NAFTA.

<sup>48</sup> See for example, the EFTA-Singapore, Article 4 or Chile-Korea, Article 1.3.

<sup>49</sup> The Australia-Thailand, Article 703(1).

<sup>50</sup> US-Singapore preamble: Recognizing that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that an open and non-discriminatory multilateral trading system can play a major role in achieving sustainable development.

US-Australia preamble: committing the parties to implement the Agreement in a manner consistent with their commitment to high labour standards, sustainable development, and environmental protection.

The US-Morocco preamble: Desiring to strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation.

more boilerplate statements directed exclusively towards improving labour conditions. These statements can be both relatively weak, such as the US-Peru RTA which simply agrees to ‘improve’ labour conditions, without specifying standards or rights; or as with the US-Oman RTA, they can show intent to enforce basic workers’ rights and to strengthen labour law enforcement.<sup>51</sup>

Those RTAs with a separate side agreement on labour regulation<sup>52</sup> contain a statement on enforcing basic workers’ rights similar to that set out in the NAFTA. This preamble focuses on increasing domestic labour rights and standards in addition to respecting commitments to international labour standards and domestic law enforcement mechanisms. However, while they are more detailed than the other RTAs, the statements’ intentions go no further than those set out in the preamble of those RTAs that accommodate labour provisions within the main trade agreement, such as the US-Chile RTA for example.<sup>53</sup>

## Post-2010 RTAs

All the post-2010 FTAs surveyed include at least one preamble recital relating to labour. The USMCA promotes the protection and enforcement of labour rights, the improvement of working conditions, the strengthening of cooperation and the Parties’ capacity on labour issues. While the CPTPP reaffirms the importance of promoting labour rights alongside other public interest issues. The CETA agrees to implement the Agreement in a manner consistent with the enforcement of their respective labour laws and that enhances their levels of labour protection, and building upon their international commitments on labour matters. The EU-Singapore has two statements noting their determination to promote trade and investment in a manner mindful of high levels of labour protection and relevant internationally-recognised standards and agreements to which they are Parties, while reaffirming each Party’s right to adopt and enforce measures necessary to pursue legitimate policy objectives.

## The scope of the labour provisions

### Earlier FTAs

It is of little surprise that those earlier RTAs surveyed which have no aspirational reference to labour in their preamble, do not contain any specific labour provisions within the body of the trade agreement either.<sup>54</sup> Yet this does not necessarily reflect on their domestic labour standards. For instance, a government may have signed up to relevant ILO Conventions independently of its trade agreements. Australia, for example, has been particularly vocal about the misuse of labour laws in RTAs for the purposes of economic protectionism, while also being a member of the ILO since 1919 and ratifying 47 labour conventions<sup>55</sup>. The US, on the other hand, became an ILO member in 1934 (with a break between 1977 and 1980) and has ratified only 14 conventions<sup>56</sup> but unlike Australia, insists on including labour regulation in its RTAs. Certain labour rights have also been identified by the 1998 ILO Declaration on Fundamental Principles and Rights at Work (*ILO Declaration*) as ‘fundamental rights’ of all people regardless of whether a government has ratified any labour conventions and regardless of whether or not any RTA it negotiates sets out these commitments. These fundamental rights include: freedom of association; the right to organize and bargain collectively; non-discrimination in employment; freedom from forced labour; a minimum age of employment for children; and eliminating the worst forms of child labour.

Leaving aside those RTAs without any labour provisions, the earliest model of labour provisions with the most minimal scope of application can be identified in the Japan-Philippines RTA. This agreement subsumes labour regulation within one investment and labour provision, which focuses solely on ‘not weakening’ domestic labour laws to encourage investment.<sup>57</sup> The use of the word *shall* is interpreted by courts to be stronger than the term *should* and compels the Parties to maintain their existing labour laws.

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51 The US-Bahrain and US-Oman agreements use identical language. The US-CAFTA-DR model has two separate statements on labour standards, including the enhancement and enforcement of ‘basic’ workers’ rights and conditions, as well as introducing an agreement to strengthen cooperation between the Parties on labour matters.

52 The NAFTA, Canada–Chile and Canada–Costa Rica RTAs.

53 Build on their respective international commitments and strengthen their cooperation on labor matters; Protect, enhance, and enforce basic workers’ rights.

54 All EFTA bilaterals, Singapore–India, Japan–Malaysia, Korea–Singapore, NZ–Singapore, Australia–Thailand and Australia–Singapore.

55 The complete Australian list is located at: <http://www.ilo.org/ilolex/english/newratframeE.htm>

56 The complete US list is located at: <http://www.ilo.org/ilolex/english/newratframeE.htm>

57 Japan–Philippines RTA. Article 103.

These labour laws are defined within the agreement with specific reference to an ‘exhaustive’ list of internationally recognised labour standards.<sup>58</sup>

The EC-Chile RTA labour regulation is incorporated within one general provision on social cooperation. Article 44:1 expresses commitment to relevant ILO Conventions and topics including, but not limited to: the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labour and the equal treatment between men and women. The article states that the Parties shall give priority to domestic measures aimed at *developing and modernising labour relations, working conditions, social welfare and employment security*.<sup>59</sup> However, there are no further details or conditions on how to promote or monitor these activities.

While the US-Jordan labour commitments are also incorporated within one article, the scope is unusual. This provision reaffirms the Parties’ commitment to the ILO Declaration and ensures that these internationally recognized principles and labour rights are recognized and protected by domestic law. However, the obligations go further in stating that: *A Party shall not fail to effectively enforce its domestic labour laws in a manner affecting trade between the Parties*.<sup>60</sup> Again, the use of the word *shall* denotes that the Parties have an obligation to enforce domestic labour laws which are based on international principles and standards. However, it also links those standards to an ‘affecting trade’ test within the agreement. This obligation is covered by the agreement’s general DSM should either of the Parties fails to enforce its domestic commitments. The US-Korea RTA significantly broadens this obligation by stating that: *Neither Party shall fail to effectively enforce its labor laws... through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties...*.<sup>61</sup> While this agreement contains a separate chapter for labour regulation, the scope of the provisions is limited to implementing existing domestic labour laws that reflect the principles and rights recognized in the ILO Declaration, see above.

Those RTAs with a separate side agreement on labour<sup>62</sup> also commit the Parties to enforce their domestic labour laws. The North American Agreement on Labour Cooperation (NAALC), for example, states that each Party shall promote compliance and effectively enforce its labour law through appropriate government action. Article 3 affirms the right of each Party to establish and or modify its own domestic labour standards. The NAALC explicitly recognises certain labour principles which are not included in the ILO Declaration.<sup>63</sup> The same principles are replicated in the Canada-Costa Rica and Canada-Chile RTAs.<sup>64</sup> While these RTAs do not hold labour provisions with non-discrimination rights as extensive as the ILO’s fundamental rights,<sup>65</sup> they include additional rights with respect to minimum wages, hours, and health and safety, migrant workers’ rights, and compensation for workplace injuries.<sup>66</sup> These rights are embedded into the US trade legislation and are a congressionally-mandated negotiating objective.

## Post-2010 RTAs

Under the USMCA each Party shall adopt and maintain in its statutes and regulations, and practices as stated in the ILO Declaration on Rights at Work.<sup>67</sup> The parties shall also adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. The provision replicates the earlier US-Korea provision in stating that, no Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties<sup>9</sup> after the date of entry into force of this Agreement. Again, nothing empowers a Party’s authorities to undertake

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58 The right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labour; labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

59 EC-Chile RTA. Article 44:4(c).

60 US Jordan RTA. Article 6:4(a).

61 US-Korea RTA. Article 19.2.

62 NAFTA/NAALC and Canada – Chile/CCALC RTAs.

63 Including the prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses and the protection of migrant workers.

64 With the exception of the Canada-Chile agreement’s omission of the protection of migrant workers

65 These include as a fundamental right: the freedom from discrimination in employment based on race, gender, age or other characteristics.

66 Also included in the NAALC and the CCALC RTAs.

67 Article 23.3: Labor Rights. (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor;

(c) the effective abolition of child labor and, for the purposes of this Agreement, a prohibition on the worst forms of child labor; and (d) the elimination of discrimination in respect of employment and occupation.

labour law enforcement activities in the territory of another Party. The parties also seek to eliminate all forms of forced or compulsory labour, including forced or compulsory child labour and shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour.<sup>68</sup> The USMCA also states that no Party shall fail to address cases of violence or threats of violence against workers, directly related to exercising or attempting to exercise their rights again through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.<sup>69</sup>

Interestingly, migrant workers are also recognised and are to be protected under its labour laws, whether they are nationals or non-nationals of the Party.<sup>70</sup> Another controversial paragraph was included regarding the goal of eliminating sex-based discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. The provision obligates each Party to implement policies that protect workers against employment discrimination on the basis of sex, including with regard to pregnancy, sexual harassment, sexual orientation, gender identity, and caregiving responsibilities, provide job-protected leave for birth or adoption of a child and care of family members, and protect against wage discrimination.<sup>71</sup> However, it has been noted,<sup>72</sup> that the Office of the U.S. Trade Representative, which led the negotiations with Canada and Mexico, has not highlighted this measure since the deal was concluded. This could reflect concern about pro-sovereignty conservatives "expressing outrage at a treaty that tells us how to define males and females," especially if this is seen as putting the U.S. in violation of its new USMCA commitment. "Shall implement policies" may give some discretion as to what exactly is required. The USMCA also includes an ANNEX covering requirements for Worker Representation in Collective Bargaining in Mexico.<sup>73</sup> This annex requires that Mexico adopt and maintain laws and institutions necessary for the effective recognition of the right to collective bargaining by January 1<sup>st</sup> 2019.

Under the CETA, the right of each Party to set its labour priorities is preserved, although each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection.<sup>74</sup> Nevertheless, the Parties affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998, the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008. This also includes non-discrimination in respect of working conditions, including for migrant workers.<sup>75</sup> The parties also agreed that they shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment.<sup>76</sup>

Parties to the CPTPP also affirm these obligations as members of the ILO, including those stated in the ILO Declaration, regarding labour rights within their territories. Although they recognise that labour standards should not be used for protectionist trade purpose,<sup>77</sup> the parties also agree not to waive or otherwise derogate from, or offer to waive or otherwise derogate from implementing these labour rights.<sup>78</sup>

Against the norm of including a chapter dedicated to trade and labour standards, the EU-Singapore labour provisions are incorporated into the general chapter on trade and sustainable development. Under the provision on Multilateral Labour Standards and Agreements,<sup>79</sup> the parties reaffirm their commitments, under the Ministerial Declaration of the UN Economic and Social Council on Generating Full and Productive Employment and Decent Work for All of 2006, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation. They also commit to the obligations assumed under the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties will also

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68 Article 23.6: Forced or Compulsory Labor

69 Article 23.7 Violence Against Workers

70 Article 23.8 Migrant Workers

71 Article 23.9 Sex-Based Discrimination in the Workplace

72 <https://www.politico.com/story/2018/10/23/new-nafta-lgbtq-rights-874004>

73 ANNEX 23-A: Worker Representation In Collective Bargaining In Mexico

74 CETA Article 23.2 Right to regulate and levels of protection

75 CETA Article 23.3 Multilateral labour standards and agreements

76 CETA Article 23.4 Upholding levels of protection

77 CPTPP Article 19.2: Statement of Shared Commitment

78 Article 19.3.1 (Labour Rights)

79 EU-Singapore Article 12.3

consider the ratification and effective implementation of other ILO conventions, taking into account domestic circumstances.

## Labour institutions and agencies

### Earlier RTAs

The institutions created to deal with the procedural issues related to the implementation of the agreements' labour commitments range from what could be termed the 'incorporation' model to a 'minimalist' model. The former type subsumes labour regulation issues within the Joint Committee established to administrate the entire agreement.<sup>80</sup> The opposite of this consists of an individual government official acting as a national contact point.

Within this framework, the minimalist approach identified in the US-Morocco RTA involves a commitment from both Parties to designate a domestic contact point at a national level within the labour ministry to implement the labour provisions attached to the agreement. Beyond this, there is little more than a voluntary option to convene a national labour advisory committee and to publish relevant reports 'where appropriate.' Stronger commitments<sup>81</sup> create a specific regional labour affairs council or labour commission to attend to the implementation of labour provisions contained in the agreement.<sup>82</sup> In the Canadian RTAs, a 'Ministerial Council' comprised of the labour affairs ministers is established to oversee and promote the implementation of the side agreement.<sup>83</sup> The NAFTA's NAALC side agreement sets out the most elaborate regional structure in the Commission<sup>84</sup> aided by a National Administrative Office belonging to each Party.<sup>85</sup>

### Post-2010 RTAs

Under the USMCA labour chapter, a Labour Council is established composed of senior governmental representatives and shall meet within one year of the date of entry into force of this Agreement and thereafter every two years, unless the Parties decide otherwise.<sup>86</sup> During the fifth year the Council shall review the operation and effectiveness of this Chapter and thereafter may undertake subsequent reviews and shall issue a joint summary report or statement on its work at the end of each Council meeting. A contact point shall also be designated within each party's labour ministry or equivalent entity to facilitate regular communication and coordination between the Parties, including responding to requests for information.<sup>87</sup> This arrangement is also established under the CPTPP agreement.<sup>88</sup>

Under the CETA, each Party must designate an office to serve as the contact point for the implementation of this Chapter, including with regard to cooperative programmes and activities in accordance, the receipt of submissions and communications and information to be provided to the other Party, the Panels of Experts and the public.<sup>89</sup> This labour contact point is complemented by the Committee on Trade and Sustainable Development, which oversees the implementation of the labour chapter and review the progress achieved under it, including its operation and effectiveness.

The EU-Singapore trade and sustainable development chapter requires an office within each parties' administration to serve as contact point with the other Party for purposes of implementing this Chapter. A Board on Trade and Sustainable Development is also established, comprised of senior officials from within the administrations of each Party. This Board must meet within the first two years, and thereafter as necessary, to oversee the implementation of this Chapter. Each meeting of the Board shall include a public session with stakeholders to exchange views on issues related to the implementation of this Chapter.<sup>90</sup>

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<sup>80</sup> US-Singapore, US-Oman and US-Jordan model.

<sup>81</sup> This is seen in the US-Chile and US-CAFTA-DR agreements, for example.

<sup>82</sup> This body must be recruited from cabinet level or equivalent. All decisions must be taken by consensus and should be made public along with any labour reports.

<sup>83</sup> The Council is assisted by the National Secretariat of each Party, which in turn may set up National Advisory committees. However, the Canada-Costa Rica agreement does not set out a specific requirement for this Council to meet.

<sup>84</sup> The NAFTA NAALC. Article 8.

<sup>85</sup> This is to be comprised of labour ministers of the Parties or their designees and must meet at least once a year.

<sup>86</sup> USMCA Article 23.14: Labor Council

<sup>87</sup> USMCA Article 23.15: Contact Points

<sup>88</sup> CPTPP Article 19.12: Labour Council Article 19.13: Contact Points.

<sup>89</sup> CETA Article 23.8 Institutional mechanisms

<sup>90</sup> EU Singapore. Article 12.15 Institutional Set up and Monitoring Mechanism



## The dispute settlement mechanism (DSM)

The enforceability of labour provisions in the RTAs surveyed can also be arranged along a continuum. On one end the labour obligations are covered under the general DSM and can therefore be viewed in the same light - and with the same level of enforceability - as the trade obligations in the agreement. At the other extreme, the Parties simply desire to comply with their domestic labour laws and policies, without any enforcement mechanisms to promote these objectives beyond this hortatory commitment. The 'median' model provides a set of remedies, including fines and trade sanctions potentially, but only in the event that a Party persistently fails to comply with its domestic labour obligations in a manner affecting trade between the parties.

### Early RTAs

An example of the first model is the DSM is set out in the Japan - Philippines RTA. This incorporates its labour objectives within the investment provisions and a dispute arising under the labour and investment provision may be brought to the general dispute settlement mechanism.<sup>91</sup> For instance, if one Party considers that the other has weakened its labour laws to encourage investment, it can request consultations with the other Party with a view to avoiding any 'race to the bottom' in labour standards. An arbitral tribunal<sup>92</sup> must be created to determine whether a Party has failed to comply with its obligations. In such a situation, the agreement provides that ultimately one Party may temporarily, and subject to certain procedural restrictions, suspend its obligations to the other Party arising under the agreement. This suspension must, where possible, be restricted to the same sector or sectors to which the impairment relates; in effect, only within investment. The US-Jordan labour provision also falls under the agreement's general DSM. This mechanism is potentially stronger than the other DSMs surveyed because it can allow ultimately for an independent supranational dispute settlement mechanism.<sup>93</sup> If the arbitral panel finds a failure has occurred, the complaining Party may withdraw trade benefits or take other appropriate measures until the non-conforming Party comes into compliance with its labour commitments. However, the US-Jordan agreement is distinct.

The most common early DSM model entitles a Party to bring a dispute only if another Parties' domestic labour laws are *'not effectively enforced, through a sustained or recurring action or inaction, and in a manner affecting trade between the Parties.'*<sup>94</sup> A further salient feature is that only governments can invoke the DSM; a Party cannot provide private rights of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement. The procedural guarantees within the labour chapter require that each Party provides 'remedies' to ensure that a Party either implements its labour commitments or faces various penalties. Remedies include: orders, fines, penalties, or temporary workplace closures, depending on whether they are already provided for in the Party's domestic laws. A specific provision is included concerning 'non-implementation in certain disputes', which states that if a resolution is not reached the complaining Party may request that a panel is reconvened to impose an annual monetary assessment. These monetary assessments are to be paid into a fund established by the Joint Committee for 'appropriate labour initiatives' such as efforts to improve or enhance law enforcement in the territory of the Party complained against, consistent with its law. If the complaining Party cannot obtain the funds from the other Party after a given time frame, ultimate measures include suspending tariff benefits under the agreement as is necessary only to collect the assessment.

Another earlier DSM model can be ascribed to RTAs that hold separate labour side agreements. This side agreement contains its own DSM,<sup>95</sup> separated from the DSM covering the trade obligations in the main agreement. Within the side agreement's DSM, again the focus is on enforcing domestic laws; one Party is prohibited from enforcing labour law in the territory of the other Party. That is, private rights of action are not provided for under one Party's domestic law against the other Party on the grounds that it has not fulfilled its commitments under the labour agreement. Differences exist within the RTAs remedies. The fines collected in the Canada-Chile agreement must be paid into a fund to improve or enhance the labour

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<sup>91</sup> This is established under Japan-Philippines RTA, Chapter 15: Dispute Avoidance and Settlement.

<sup>92</sup> This must be composed of an arbitrator from each Party, must both propose and agree to a third arbitrator to be the chair of the arbitral tribunal. This chair cannot be a national of either Party, nor have residence in either Party, nor be employed by either Party.

<sup>93</sup> US-Jordan RTA. Article 17.4(c).

<sup>94</sup> US-Singapore, US-Morocco US-Oman, US-Chile, US-Peru and US-CAFTA-DR RTAs.

<sup>95</sup> The Canada-Chile, Canada-Costa Rica and the NAFTA RTAs.

law enforcement in the Party complained against, consistent with its own law. The amount of the fine should relate to specific factors, including the pervasiveness of the persistent pattern of failure to effectively enforce its labour standards, the level of enforcement reasonably be expected of a Party given its resource constraints, the reasons provided for not fully implementing an action plan and efforts made to remedy the pattern of non-enforcement since the final panel report. The Canada-Costa Rica RTA on the other hand, precludes monetary remedies or any measure affecting trade.<sup>96</sup> Instead, the complaining Party may modify their cooperative activities to encourage the other Party to remedy the persistent pattern of non-enforcement of labour laws. Some indicative cooperative activities include seminars conferences and training sessions, joint research projects, technical assistance.<sup>97</sup>

The NAALC dispute settlement provisions potentially provide the greatest rights of action by ensuring that anyone with a 'legally-recognized interest' should have access to tribunals for the enforcement of the Party's domestic labour law.<sup>98</sup> The National Administrative Office (NAO) in each signatory's labour department receives and processes submissions concerning non-enforcement of labour law in either of the two other countries. The NAOs are obliged to provide information, if requested, from any of the other NAOs and if necessary request ministerial consultations. Crucially, for any problems involving the right of freedom of association the right to bargain collectively and the right to strike, dispute settlement is confined to diplomatic avenues. That is, if diplomacy cannot resolve the dispute, no further action can be taken under the agreement.

In cases of child labour; minimum employment standards and occupational safety and health, an ad hoc Evaluation Committee of Experts (ECE) appointed by the ministerial council can produce a report and recommendations for review by the Ministerial Council and if necessary appoint an arbitration tribunal.<sup>99</sup> A persistent pattern of non-enforcement can ultimately result in fines to be paid into a fund to improve enforcement of labour law in the offending country. If these fines are not paid, trade sanctions may be imposed.<sup>100</sup> The procedural guarantees provision sets out a more extensive list of remedies including: orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures. The transparency provisions are also stronger, allowing third Parties with a recognized interest to participate in consultations, while Council recommendations may be made public.

## Post-2010 RTAs

Under the EU Singapore RTA, if there is disagreement on any labour matter arising under the trade and sustainable development Chapter, the Parties only have recourse to Government Consultations and Panel of Experts. The general RTA Dispute Settlement chapter and chapter on the Mediation Mechanism do not apply to the labour provisions set out in this Chapter.<sup>101</sup> The Panel of Experts issues an interim and a final report setting out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations. The Parties must then discuss appropriate measures to be implemented taking into account the report and recommendations of the Panel of Experts. The follow-up to the report and the recommendations of the Panel of Experts shall be monitored by the Board. Stakeholders may submit observations to the Board in this regard.<sup>102</sup> This model is replicated under the EU-CETA agreement. However, an addition requirement is included to note that the Parties understand that the labour obligations included are binding and enforceable through the procedures for the resolution of disputes provided within the chapter. Within this context, the Parties shall discuss, through the meetings of the Committee on Trade and Sustainable Development, the effectiveness of the implementation of the Chapter.<sup>103</sup>

Under both the USMCA<sup>104</sup> and the CPTPP,<sup>105</sup> a Party may request labour consultations with another regarding any matter arising under this Chapter. If the consulting Parties have failed to resolve the matter, any consulting Party may request that the relevant Ministers of the consulting Parties convene to

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96. The Canada-Costa Rica RTA. Article 23.5.

97. These are listed in the Canada-Costa Rica RTA. Article 12.

98. The NAFTA/NAALC RTA. Article 4.

99. The NAFTA NAALC. Article 4.

100. There is a cap set on fines and trade sanctions: the lower of either: 0.007% of the volume of trade between the two countries or US\$ 20 million.

101. EU – Singapore Article 12.16 Government Consultations

102. EU- Singapore Article 12.16 Government Consultations

103. CETA Article 23.11

104. USMCA Article 23.17: Labor Consultations

105. CPTPP Article 19.15: Labour Consultations

consider the matter at issue having recourse to such procedures as good offices, conciliation or mediation. If the consulting Parties have failed to resolve the matter within 60 days, the requesting Party may call for the establishment of a panel. These labour consultations shall be confidential and without prejudice to the rights of a Party in another proceeding. Further, no Party shall have recourse to the general dispute settlement under Chapter 31 for a matter arising under this Chapter without first seeking to resolve the matter in accordance with this Article.

### Assessing labour law in RTAs

When compared to the GATT/WTO, it is clear from that more and more RTAs now routinely have labour regimes and some even go as far as establishing regional agencies to monitor and implement the RTA's labour provisions. However, a significant feature here is that in all of these agreements each Party makes a commitment to protect the agreed-upon labour rights in its own domestic territory. None of the agreements creates a right of enforcement by one Party to an agreement within the territory of another signatory Party. For those advocating the effective implementation of high labour standards, this could be seen as a weakness. For instance, the labour laws and constitutions of the CAFTA-DR countries are already comparable to ILO core labour standards but have not been enforced effectively. Successive governments have lacked the capacity to enforce their own respective domestic labour laws due to financial and political constraints. This implies the need for capacity building and financial prioritising rather than creating more labour law.

As the first RTA to incorporate labour regulation issues in RTA negotiations, the NAFTA's labour side agreement - the North Atlantic Agreement on Labor Cooperation (the NAALC) - was seen by many to be a positive regulatory departure. With the benefit of hindsight, it is now widely viewed to contain significant flaws. Its strength is limited because it does not incorporate by reference, a set of international labour rights and standards; it commits the signatories to enforce their national labour law. The overall impact of the agreement is therefore contradictory. In some respects, the NAALC labour principles go beyond the core labour rights embodied in the 1998 ILO Declaration and the NAALC calls on all three governments to improve performance referencing these rights and standards. However, there is no enforceable obligation to do so.<sup>106</sup> The NAALC also provides that a Party does not violate its obligation to enforce its labour legislation if this represents a *bona fide* decision to allocate resources to other labour or environmental matters respectively.<sup>107</sup> This provision is vague but it applies to both the 'setting' and enforcement of labour legislation and could potentially serve as a loophole to the agreement's other obligations. Now it is known that the DSM is both quasi-diplomatic and bureaucratically cumbersome, requiring over 30 months to reach its final stages. And while the agreement allows for 'interested Parties' to have access to the DSM, it does not define what constitutes an 'interested' Party. This may, for instance, exclude those parties without legal standing in the domestic legal system of the allegedly non-compliant Party, such as international trade unions and human rights NGOs. This would significantly reduce the ability of international 'interested parties' to use the provisions of the agreement to promote labour standards. Yet despite these shortcomings, the reciprocity of labour obligations included within this side agreement has led to complaints about U.S. labour practices, which was unforeseen by most. Several NAO submissions have resulted in Ministerial Consultations. Most complaints have been allegations of failure to enforce the right to free association and organization. It has also been argued that the publicity achieved by these complaints has had positive repercussions for labour law enforcement generally in these countries.<sup>108</sup>

The RTAs signed since the 2010 still continue to restrict the obligations of the Parties enforcing domestic legislation. However, the scope of the obligations has expanded in all the recent RTAs, most significantly under the USMCA, which includes provisions guarding against discrimination in terms of gender and non-national migrant workers.

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<sup>106</sup> During the NAFTA NAALC negotiations, the Mexican and Canadian Parties refused to agree to any commitment to international standards. In Canada this was seen as a constitutional issue because most labour law is provincial. In Mexico, it has been argued that dominant labour unions lobbied successfully to protect their position against independent unions.

<sup>107</sup> The NAALC, Article 49(1). The NAAEC, Article 45(1);

<sup>108</sup> Compa, L. NAFTA's Labor Side Accord: A Three-Year Accounting. NAFTA Law and Business Review of the Americas, Summer 1997.

## Conclusion

The UK and Canada are well positioned, with shared values and customs, to commit to a fair and progressive free trade agreement. Under normal circumstances, free trade agreements can be controversial and politicised issues. In the current political economy, the UK and Canada will need to be mindful of various levels of society – civil society including dichotomised fractions supporting protectionism and others globalisation as well as the international precedents such as the global architecture and trends in RTAs. Above, we have described how changes environmental and labour provisions in RTAs relate to global trends and state sovereignty, both spheres relate to the current political economy and a potential Canada-UK free trade agreement. However, there are gaps in the literature that would benefit from further exploration.

The literature review on the fractures in our societies makes clear that the impact of Brexit on the UK economy will be negative and profound – but that the magnitude of impact will depend greatly on what the new relationship looks like and what the UK relationships with other countries look like. Overall, Brexit will reduce income per capita in the UK and the best way to mitigate the economic costs of leaving will be for the UK to remain closely integrated into the European single market and to maintain similar access to other partner countries that the UK currently enjoys through EU membership. As Brexit and the backstop have yet to be concluded, it is difficult to know the limitations and opportunities the UK will have before it until a resolution has been decided. To what degree can the UK seek assurances from other potential RTA or bilateral trade partners as March 2019 approaches? Some countries, like Canada have committed to transferring EU RTA provisions to the UK after Brexit. How long will it take for those agreements to be renegotiated and to what ends? As above, this instability creates business uncertainty which will also have an adverse effect on the UK economy.

Focusing on the international sphere, governments now successfully negotiate very comprehensive labour and environmental provisions in RTAs and reference multilateral labour and environmental standards in a manner the WTO is unlikely to be able to do in the foreseeable future. Although there are also examples of both developed and developing countries that will not include labour and/or environmental provisions in their trade agreements unless they are negotiating with either the US or the EU,<sup>109</sup> indicating that there is not a distinct developed versus developing country policy position on the place of these non-trade issues within a regional trade agreement.

Those RTAs which include labour and environmental provisions aiming to promote international principles and standards, typically reference the ILO Declaration and MEAs respectively. These RTAs explicitly try to develop textual coherence and legal integration with the wider body of international law, as well as referencing both the language and some agreements of the GATT/WTO. Nevertheless, even in the RTAs with the strongest obligations, the commitments are restricted to effective domestic law enforcement, the need to show the impact of a violation on trade between the parties to the agreement, or the threat of retaliatory action was removed by the exchange of side letters between the parties.

Whether or not these legal provisions can meet their policy objectives still remains dependent on domestic factors such as the political will and resources to enforce these laws. For example, the difficulty appointing panels through consensus under the old NAFTA chapter 20 has not been effectively addressed in the new NAFTA USMCA, nor has the lack of transparency on the panel appointment system. That is, if the challenge is in the implementation rather than the creation of such regulation then these RTAs could be doing little more than duplicating existing law and institutional arrangements - *unless* they offer a stronger incentive to implement than currently exists at the multilateral or national level. This suggests further research is necessary to identify whether this is possible within a fair and progressive future FTA between the UK and Canada.

FTAs with substantive environmental provisions rose from 30 % in 2010 to nearly 70 % in 2012, and can now be considered the norm.<sup>110</sup> Similarly, the amount of labour provisions in FTAs multiplied from 4 in 1995 to 37 out of 186 FTAs in force notified to the WTO in 2009.<sup>111</sup> This paper charts the legal development of environmental and labour regimes in RTAs since the 1994 NAFTA up to the renegotiated NAFTA – the 2018 USMCA. It identifies the different approaches followed by governments seeking to regulate labour and the environment within the territories of the parties to these regional agreements. It uses this comparative historical assessment of the scope and strength of these regimes, to identify areas for further research with reference to a future UK-Canada fair and progressive FTA.

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<sup>109</sup> Australia, Singapore, India, Malaysia, Korea, Japan, and the EFTA countries.

<sup>110</sup> C. George, “Environment and regional trade agreements. Emerging trends and policy drivers”, OECD Trade and Environment Working Papers 2014/02, p.9.

<sup>111</sup> ILO, “World work report 2009: The global jobs crisis and beyond”, International Institute for Labour Studies, 2009, p.63.

This paper shows that despite the shift towards including comprehensive labour and environmental regulation within RTAs, there remain strict limits to how far these regimes can promote these policy objectives. Further research is required to identify how a more progressive FTA could be designed to more directly address issues such as independently monitoring and enforcing labour and human rights, or achieving government's nationally determined contributions to reduce harmful emissions under the Paris Agreement.

There are a number of issues that must be identified when proceeding with this Canada-UK free trade agreement project. First, Canada's Constitution and the UK's devolution legislations assign jurisdictional authorities to the sub-state regions. There are significant differences between the Canadian and British systems that need to be understood. Second, both countries must ensure the legitimacy of this trade agreement. The legitimacy of a federal state is its ability to produce results,<sup>112</sup> and with respect to a free trade agreement, it is a state's ability to successfully negotiate, ratify, and implement the agreement. Third, what are some of the domestic tensions that could derail a successful trade deal? Finally, with the differences in the two countries, what can be learnt from previous trade agreements and emulated going forward?

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<sup>112</sup> Bakvis and Skogstad (2012) p. 3.

## Appendix: Table 1: Environmental provisions of selected RTAs

FTA	Year	Preamble Objectives	General Excepts	Hierarchy of Treaty Obligations	Investment	Level of Protection	Agency	DSM	Remedies	Private Access to Remedies
USMCA	2018	WTO+	WTO+	MEAs to which they are a party to Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979	WTO+	Domestic	✓	✓	✓	✓
CPTPP	2018	WTO+	WTO+	MEAs to which they are a party to Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979	WTO+	Domestic	✓	✓	✓	✓
CETA	2017	WTO+	WTO+	MEAs to which they are a party to Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979	WTO+	Domestic	✓			
EU-Sing	2016	WTO+	WTO+	MEAs to which they are a party to UNFCC Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979	WTO+	Domestic	✓			
Aus-Sing	2003					Domestic				
Aus-Thai	2004					Domestic				
Sin-NZ	2000			Others <sup>113</sup>		Domestic				
Sin-Kor	2005			Others, including WTO <sup>114</sup>	WTO+	Domestic				
Sin-India	2006	WTO <sup>115</sup>	WTO+ <sup>116</sup>	Others <sup>117</sup>		Domestic				
Can-Chile	1996	WTO+	WTO+ <sup>118</sup>	Others <sup>119</sup> Stockholm Declaration 1972 Rio Declaration 1992 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Montreal Protocol, 1990 Basel Convention, 1989	WTO+	Domestic	✓		✓	✓

<sup>113</sup>Article 80 states that 'nothing in this Agreement shall be regarded as exempting either Party to this Agreement from its obligations under any international, regional or bilateral agreements to which it is a party and any inconsistency with the provisions of this Agreement shall be resolved in accordance with the general principles of international law.

<sup>114</sup>Article 1.3 affirms the Parties existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO Agreement.

<sup>115</sup>Replicates the language of the GATT/WTO preamble.

<sup>116</sup>Singapore-India exceptions include those: 'necessary to protect human, animal or plant life or health and relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.'

<sup>117</sup>Article 16.5 uses the same language as the Singapore-NZ FTA, *ibid*.

<sup>118</sup>Canada-Chile: The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

<sup>119</sup>In addition to a preamble objective similar to that in the Australia-Singapore agreement, the side agreement on environmental provisions includes: Article 40: Nothing in this Agreement shall be construed to affect the existing rights and obligations of either Party under other international environmental agreements, including conservation agreements, to which such Party is a party.

FTA	Year	Preamble Objectives	General Excepts	Hierarchy of Treaty Obligations	Investment	Level of Protection	Agency	DSM	Remedies	Private Access to Remedies
Can-Cos	2002	WTO+	WTO+ <sup>120</sup>	CCRF <sup>121</sup> Stockholm Declaration 1972 Rio Declaration 1992 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Montreal Protocol, 1990 Basel Convention, 1989		Domestic			✓	✓
Chile-EU	2002	WTO				Domestic				
Chile-Efta	2003	WTO				Domestic				
Efta-Mex	2000	WTO				Domestic				
Efta-Sin	2002	WTO		Others <sup>122</sup>		Domestic				
Efta-Kor	2005	WTO		Others <sup>123</sup>		Domestic				
Jap-Sin	2002					Domestic				
Jap-Mex	2004			GATT/WTO Kyoto Protocol Clean Development Mechanism	WTO+ <sup>124</sup>	Domestic				
Jap-Phil	2006			WTO	WTO+	Domestic				
US-Jordan	2000	WTO+	WTO+ <sup>125</sup>	WTO The International Convention for the Protection of New Varieties of Plants (1991) Articles 1-22		Domestic		✓	✓	
NAFTA/ NAAEC	1993	WTO+	WTO+ <sup>126</sup>	NAFTA Pre-existing MEA obligations <sup>127</sup> Stockholm Declaration 1972 Rio Declaration 1992 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Montreal Protocol, 1990	WTO+ <sup>128</sup>	Domestic	✓	✓	✓	✓

<sup>120</sup>As in Canada-Chile op cit 102.

<sup>121</sup>As in Canada-Chile Article 40 op cit 102, but also Article I.3 The Parties affirm their existing rights and obligations with respect to each other under the Marrakesh Agreement Establishing the World Trade Organization and other agreements to which such Parties are party. 2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

<sup>122</sup>Efta-Singapore: Article 4 Relationship to Other Agreements The provisions of this Agreement shall be without prejudice to the rights and obligations of the Parties under the Marrakesh Agreement Establishing the World Trade Organization and the other agreements negotiated thereunder to which they are a party and any other international agreement to which they are a party.

<sup>123</sup>As in Efta-Singapore ibid.

<sup>124</sup>Article 74 The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its Area of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.' (emphasis added).

<sup>125</sup>As in Canada-Chile, op cit 102.

<sup>126</sup>As in Canada-Chile op cit 102.

<sup>127</sup>Article 40: Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party.

<sup>128</sup>Article 1114(2) NAFTA uses the same language and therefore level of compulsion as in Japan – Mexico Article 74. op cit 108.

FTA	Year	Preamble Objectives	General Excepts	Hierarchy of Treaty Obligations	Investment	Level of Protection	Agency	DSM	Remedies	Private Access to Remedies
				Basel Convention, 1989 Canada-US agreement on the Transboundary Movement of Hazardous Waste, 1986. Mexico-US cooperation agreement for the Protection and Improvement of the Environment in the Border Area, 1983.						
US-Chile	2003	WTO+	WTO+ <sup>129</sup>	WTO; pre-existing MEA obligations	WTO+ <sup>130</sup>	Domestic	✓	✓	✓	
US-Mor	2004	WTO+	WTO+ <sup>131</sup>	Pre-existing MEA obligations	WTO+ <sup>132</sup>	Domestic		✓	✓	
US-Aus	2004	WTO	WTO+ <sup>133</sup>	WTO	WTO+ <sup>134</sup>	Domestic		✓		
US-Bah	2004	WTO+	WTO+ <sup>135</sup>	WTO	WTO+ <sup>136</sup>	Domestic		✓	✓	
CAFTA-DR-US	2004	WTO+	WTO+ <sup>137</sup>	WTO; Central American integration instruments	WTO+ <sup>138</sup>	Domestic	✓	✓	✓	
US-Peru	2006	WTO	WTO+ <sup>139</sup>	WTO	WTO+ <sup>140</sup>	Domestic	✓	✓	✓	
US-Oman	2006	WTO	WTO+ <sup>141</sup>	WTO; pre-existing MEA obligations	WTO+ <sup>142</sup>	Domestic		✓	✓	
US-Kor	2007	WTO	WTO	Balancing obligations of conflicting agreements	WTO+ <sup>143</sup>	Domestic	✓	✓	✓	✓

<sup>129</sup> The US-Chile RTA Article 9.16 goes beyond GATT Article XX: The Parties understand that sub-paragraph 1(b) 'Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining measures: (b) necessary to protect human, animal, or plant life or health', includes environmental measures necessary to protect human, animal or plant life or health.

<sup>130</sup> For example, the US-Chile RTA Article 10.12: Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

<sup>131</sup> As in the US-Chile RTA Ibid.

<sup>132</sup> As in the US-Chile RTA op cit 114.

<sup>133</sup> As in the US-Chile RTA op cit 114.

<sup>134</sup> As in the US-Chile RTA op cit 114.

<sup>135</sup> As in the US-Chile RTA op cit 114.

<sup>136</sup> For example, the US-Bahrain RTA Article 16.2 states: 'each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.'

<sup>137</sup>As in the US-Chile RTA op cit 114

<sup>138</sup>As in the US-Chile RTA op cit 114

<sup>139</sup>As in Canada-Chile op cit 102.

<sup>140</sup>As in the US-Chile RTA op cit 114.

<sup>141</sup>As in the US-Chile RTA op cit 114.

<sup>142</sup> As in the US-Chile RTA op cit 114.

<sup>143</sup>The US-Korea RTA. Article 20.3:2.



**Table 2: Selected aspects of labour provisions in RTAs**

FTA	Year	Preamble	ILO Decl.	Lab & Inv	Level of Protection	DSM	Remedies <sup>144</sup>	Private Access <sup>145</sup>	Agency <sup>146</sup>
USMCA	2018	WTO+	ILO+	✓	Domestic	✓	✓	✓	✓
CPTPP	2018	WTO+	✓	✓	Domestic	✓	✓	✓	✓
CETA	2017	WTO+	✓	✓	Domestic				✓
EU-Sing	2016	WTO+	✓	✓	Domestic				✓
Aus-Sin	2003								
Aus-Thai	2004								
Sin-NZ	2000								
Sin-Kor	2005								
Sin-Ind	2006								
Can-Chi	1996	WTO+ <sup>147</sup>	ILO+ <sup>148</sup>	✓	Domestic	✓	✓	Domestic	✓ <sup>149</sup>
Can-Cos	2002								
Chi-EU	2002		✓		Domestic				
Chi-Efta	2003								
Efta-Mex	2000								
Efta-Sin	2002								
Efta-Kor	2005								
Jap-Sin	2002								
Jap-Mex	2004								
Jap-Mal	2005								
Jap-Phil	2006		✓ <sup>150</sup>	✓ <sup>151</sup>	Domestic	✓	✓	Domestic	
NAFTA	1993	WTO+	ILO+ <sup>152</sup>	✓	Domestic	✓	✓	Domestic	✓ <sup>153</sup>

<sup>144</sup>Remedies are payments or actions ordered by a court as settlement of a dispute. Remedies most commonly comprise of damages - a payment of money.

<sup>145</sup>Private access refers to the rights of non-governmental actors to access the dispute settlement mechanism.

<sup>146</sup>This definition of ‘agency’ does not include a national contact point.

<sup>147</sup>As discussed in Section 5, the GATT/WTO preamble language refers solely to raising standards of living and ensuring full employment. Thus an RTA preamble statement that refers to anything beyond this, such as strengthening labour standards, goes beyond the WTO preamble and can therefore be considered to be WTO+.

<sup>148</sup>This agreement includes: a) minimum employment standards; b) prevention of occupational injuries and illnesses; and c) compensation in cases of occupational injuries or illnesses - in addition to the Fundamental Principles and Rights at Work included in the ILO Declaration.

<sup>149</sup>Article 9:1 provides that: ‘There shall be a Ministerial Council that comprises Ministers responsible for labour affairs of the Parties or their designees.’

<sup>150</sup>This agreement does not specifically mention the ILO rather: ‘internationally recognized labour rights.’

<sup>151</sup>Japan-Philippines Article 103 states: ‘The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 below as an encouragement for the establishment, acquisition, expansion or retention of an investment in its Area. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.’

<sup>152</sup>In addition to the ten labour rights affirmed in the Canada-Chile Agreement, NAFTA’s NAALC also provides for equal protection for migrant workers.

<sup>153</sup>NAALC Article 8 states that: ‘The Parties establish the Commission for Labor Cooperation, comprising of a ministerial Council and a Secretariat and assisted by the National Administrative Office of each Party.’

# Table 3: List of RTAs examined

FTA	Year	Preamble	ILO Decl.	Lab & Inv	Level of Protection	DSM	Remedies	Private Access	Agency
US-Jor	2000	WTO+	✓	✓ <sup>154</sup>	Domestic	✓	✓	Domestic	
US-Sin	2003	WTO <sup>155</sup>	✓	✓ <sup>156</sup>	Domestic	✓	✓	Domestic	
US-Chi	2003	WTO+	✓	✓ <sup>157</sup>	Domestic	✓	✓	Domestic	✓ <sup>158</sup>
US-Mor	2004	WTO+	✓	✓ <sup>159</sup>	Domestic	✓	✓	Domestic	✓ <sup>160</sup>
US-Cafta-Dr	2004	WTO+	✓	✓ <sup>161</sup>	Domestic	✓	✓	Domestic	✓ <sup>162</sup>
US-Aus	2004	WTO+	✓	✓ <sup>163</sup>	Domestic	✓	✓		
US-Bah	2004	WTO+	✓	✓ <sup>164</sup>	Domestic	✓	✓	Domestic	
US-Oman	2006	WTO+	✓	✓ <sup>165</sup>	Domestic	✓	✓	Domestic	✓ <sup>166</sup>
US-Peru	2006	WTO+	✓	✓ <sup>167</sup>	Domestic	✓	✓	Domestic	✓ <sup>168</sup>
US-Kor	2007	WTO+	✓	✓ <sup>169</sup>	Domestic	✓		Domestic	✓ <sup>170</sup>

154 Article 6.2 states that ‘The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.’

155 Follows GATT/WTO preamble language referring solely to raising standards of living and ensuring full employment.

156 Article 17.2.2. is similar to Japan-Philippines op cit 3.

157 Article 18.2.2 is similar to Japan-Philippines op cit 3.

158 Article 18.4 provides that ‘The Parties hereby establish a Labor Affairs Council, comprising cabinet-level or equivalent representatives of the Parties, or their designees.’<sup>n</sup>

159 Article 16.2.2. is similar to Japan-Philippines op cit 3.

160 US-Morocco Article 16.4 ‘Each Party shall designate an office within its labor ministry that shall serve as a contact point with the other Party and the public for purposes of implementing this Chapter.’

161 Article 16.2.2 is similar to Japan Philippines op cit 3.

162 Article 16.4 is similar to the US-Morocco provision op cit 11.

163 Article 18.2.2 is similar to Japan-Philippines op cit 3.

164 Article 15.2.2 is similar to Japan-Philippines op cit 3.

165 Article 16.2.2 is similar to Japan-Philippines op cit 3.

166 Article 16.4.2 is similar to US-Morocco op cit 14.

167 Article 17.2.2 is similar to Japan Philippines op cit 3.

168 Article 17.4.1 states that ‘The Parties hereby establish a Labor Affairs Council (Council) comprising cabinet-level or equivalent representatives of the Parties, who may be represented on the Council by their deputies or high-level designees.’

169 Article 19.3.1(a).

170 Article 19.5 establishes a Labor Affairs Council comprising of appropriate senior officials from the labour ministry and other appropriate agencies of each Party.